

THE HONORABLE BARBARA J. ROTHSTEIN

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON**

GORDON HEMPTON, Plaintiff,

No. 3:15-cv -05696-BJR

v.

**SECOND DECLARATION OF
GORDON HEMPTON**

POND5, a Delaware Corporation; and POND5
USER CKENNEDY342, a corporation or
individual of type unknown, Defendants.

1. I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct.
2. My name is Gordon Hempton, I am the Plaintiff in this lawsuit, I am over 18 years of age and competent to testify in this matter.
3. On August 3rd, 2016, I executed a declaration in which I identified that Pond5 offered for sale and sold a number of audio files owned by myself. This declaration was made after an initial review of Pond5's spreadsheet which Pond5 provided to me during discovery and which I modified and attached to that declaration.
4. Since August 3rd, 2016, I have received additional information and I have spent more than 100 hours investigating each and every file in question by examining file lengths, waveform display, spectrum analysis, and metadata content. I now wish to update my previous Declaration with what I have found.
5. The total number of audio files uploaded by ckennedy342 onto the Pond5 and owned by Hempton is 655. A complete list of these files is attached as Exhibit 1.

Second Declaration of Gordon Hempton

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- 1 6. Among those files, 111 audio files had metadata furnished by Pond5. I
2 cannot explain why the other files would be missing metadata. Normally,
3 metadata would be used by people in the industry to indicate key traits of
4 recordings like ownership. I would very much like to know why metadata
5 was missing in the vast majority of my files that Pond5 gave me. A list of
6 the 111 files that had metadata is attached as Exhibit 2.
- 7 7. It should be noted many of the filenames used by Pond5 are, in fact,
8 identical to (or very slightly modified or a truncation of) the file names I
9 originally assigned the files. I have attached a list of file name
10 comparisons attached as Exhibit 3.
- 11 8. Relying on Pond5 furnished sales data it appears that at a minimum Pond5
12 sold 86 unique Hempton files which – again, according to Pond5’s data,
13 resulted in 146 sales. This sales summary is attached as Exhibit 4.
- 14 9. To confirm that each of these 86 unique files are mine, I performed wave
15 form display on all 86 files, and spectrum analysis on a sample of 11 files.
16 As an audio professional, I am able to use various technological tools to
17 show that the files are identical. I used two distinct methods: wave form
18 display and spectrum analysis.
- 19 10. When a sound file is opened in all audio editing software programs, the
20 entire recording can be seen visually from start to finish (left, zero seconds)
21 to finish (right, file duration). Most sound recordings are a complex series
of events with complex wave forms or fluctuations of sound pressure
levels. An audio engineer can look at a recording and immediately see
where the loudest sounds are because they reach highest on the amplitude
scale. The quietest moments are when the wave form settles closely to the
center line (zero amplitude). Any experienced audio engineer can also
quickly zoom in and examine any sound event to see greater detail, become
familiar with a file structure, and go to the sounds they seek. Any
experienced audio engineer knows that while some sound files look
similar, no two sound files look exactly alike unless they come from the
same original audio recording. Wave form display is just one thumbprint or
audio signature which can be used to identify files as sonically identical.
11. A second comparison of the files can be undertaken by spectrum analysis. I
performed this analysis on a sample of 11 files by using the same
commercially available software Sound Forge Pro 11. Spectrum analysis is
when a whole file (or any portion of a file) is analyzed to produce a
summary graph that shows the frequency range from 20 cycles per second
(Hz) to 20,000 Hz. (This is the full range of human hearing.) The
likelihood that any two sound files have exactly the same spectrum analysis
but sound different is improbable to the extent that it is statistically

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insignificant.

12. Both wave form display and spectrum analysis are good file identification methods because they are fairly independent of sample rates, file formats, and metadata - all of which can be easily changed by a user.

13. As Exhibit 5 I have attached a true and correct copy of the graphical and data output of the wave form display of all 86 file pairs that were sold on Pond5. Each pair of files includes one by ckennedy342 and one that I own. We see exact matches in wave form display and file lengths (down to one thousandth of a second).

14. As Exhibit 6 I have attached a true and correct copy of the spectrum analysis on a sample of 11 file pairs (of the 86 files) that were sold on Pond5. Each pair of files includes one by ckennedy342 and one that I own. We see exact matches in Blackman-Harris spectrum analysis.

15. There is only one conclusion: each of the files in each matched pair are essentially the same and the Pond5 are, in fact, mine.

16. I do not know how many times my files were downloaded through Pond5's practice of providing files free of charge with an "audio watermark" on the file. This is what Pond5 refers to as "evaluation license." Pond5 has only given me data on what it purports to have *sold* and not the number of times my work was downloaded free of charge. I am very much afraid that since many of my files are ambient sounds and since they are being provided by Pond5 primarily to video producers and other digital media content producers, the downloaders of the evaluation files are simply splicing out the watermark, and using my sounds in their creative works. For a person who works with audio files, this would be very easy to do. It would be as easy as cutting and pasting in a word document and it would take a matter of seconds and can be done with off-the-shelf standard audio editing software. As an example, I downloaded from Pond5 six (6) evaluation copies of files of ckennedy342's that are owned by me. Within 15 minutes, I edited the tracks and created useable files *without* Pond5's audio watermark. I produced to Pond5 in discovery copies of both the original and edited tracks (HEMP001162-1171).

17. I license my copyrighted works exclusively through BOOM library and my own library, Quiet Planet (www.quietplanet.com). In contrast to Pond5's broad license, I license my copyrighted works in a limited, closely-controlled manner, and permits only specific, clearly-delineated uses of my copyrighted works. In addition to the extremely high quality and rareness of the content, a large measure of the value to my customers of a license to my content is the exclusivity of that license (i.e. – that other customers are not

Second Declaration of Gordon Hempton

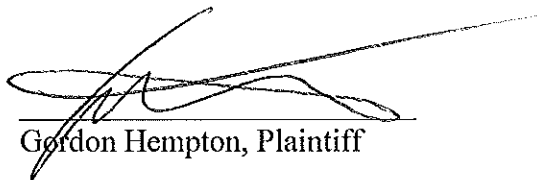
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1 licensing and broadly distributing the same audio).
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2 Signed on 8th of September 8, 2016, in Seattle, WA

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5 Gordon Hempton, Plaintiff

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